91-242

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

NO.

TUNICA-BILOXI TRIBE

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

Dated: August 1991

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QUESTION PRESENTED

Can an Indian Tribe sue the United States in the Claims Court for money damages arising out of a breach of the fiduciary obligation of the United States towards that Tribe notwithstanding the six-year limitation-period of 28 U.S.C 2501, where there has not been an unequivocal repudiation of the federal government's fiduciary obligation, nor was the Tribe aware that the federal government was legally responsible for acts done contrary to that obligation?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

NO.

TUNICA-BILOXI TRIBE

Petitioner,

VS

UNITED STATES OF AMERICA,

Respondent.

The Tunica-Biloxi Tribe, a sovereign Indian Nation, respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The decision of the United States Claims

Court dismissing the complaint of the Tunica-Biloxi Tribe is not reported, but is reproduced in the Appendix, page 1A. The opinion of the United States Court of Appeals for the Federal Circuit is not reported, but is set out in the Appendix, at pp. A-2 through A-7.

GROUNDS FOR JURISDICTION OF THIS COURT

The Judgment of the United States Court of Appeals for the Federal Circuit affirming the dismissal of the plaintiff's complaint by the United States Claim Court was issued on May 21, 1991. No rehearing was requested. This Court has jurisdiction under 18 U.S.C. 1254(1).

STATUTES INVOLVED

Two statutes are involved in this case:

1. 28 U.S.C. 1505:

> The United States Claims Court shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in

favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising uner the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Claims Court if the claimant were not an Indian tribe, band or group.

12 U.S.C. 1988 Edn. 334 (1989)

2. The Tucker Act, 28 U.S.C. 2501:

Every claim of which the United States Claim Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability

ceases.

> A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account.

12 U.S.C. 1988 Edn. 470 (1989).

STATEMENT OF THE CASE

The Tunica-Biloxi Tribe, a sovereign Indian Nation, filed a complaint seeking damages against the United States in the United States Claims Court on January 12, 1990, alleging that the United States was liable to the Tribe for $110,000,000 in damages because the former had failed, as trustee, to protect the Tribe's land-holdings in Louisiana from being illegally possessed by third persons. A major role in this dispossession was played by a federal land commission created by statute to adjudicate

claims to perfect and imperfect titles in the Territory of Orleans (later the State of Louisiana). Even though the Tribe owned land which had been recognized as the Tribe's by the previous sovereigns, France and Spain, and notwithstanding the fact that it was in actual and notorious possession of these lands on the date of the transfer of sovereignty from the French Republic to the United States, the federal government failed to instruct its land commissioners as to the modalities of aboriginal use and occupancy, the applicable Spanish law, and neglected to supervise and oversee the operations of the land commission. Thus, by means of fraud in some instances and by negligence, ignorance or indifference in others, the land commissioners caused the Tribe to be dispossessed of almost all its landholdings.

The United States filed a motion to dis-

miss under Rule 12(b)(1) of the Claims Court for lack of subjct-matter jurisdiction and because of the bar of limitations under 25 U.S.C. 2501. On June 13, 1990, the Claims Court issued a Final Order, sustaining the Government's motion to dismiss, and the Judgment of Dismisal was entered on June 14, 1990. Appendix, p. 1A. Appeal was timely noticed, on August 9, 1990, to the United States Court of Appeals for the Federal Circuit. After briefing and oral argument, the Court of Appeals affirmed the Claims Court on May 17, 1991. See Decision, pp. A2-A7, in the Appendix. No re-hearing was requested.

REASONS FOR GRANTING THE WRIT

This Court, with Rule 10.1(c), has ordained that a special and important reason for the granting of a writ of certiorari is an important question of federal law which has not

been, but ought to be, resolved by the Supreme Court of the United States. The Question Presented in this Petition go to the very heart of the fiduciary relationship between the United States and Indian Tribes, since the mechanical application of the statute of limitations in the lower courts decisions operates, at the very least, as a severe curtailment, if not rejection, of that relationship. In 1831, this Court, speaking through Mr. Chief Justice Marshall, held that Indians are "in a state of pupilage" akin to "that of a ward to his guardian." Cherokee Nation v. Georgia, 5 Pet. 1, at 17 (1831). Because its "peculiar and cardinal distinctions * * * exist no where else", Cherokee Nation, supra, 5, Pet. at 16, this Court has likened it to a "wardship", see, e.g., United States v. Kagawa, 118 U.S. 375, 383 (1886), governed by those principles which have

been developed by courts of equity. See Klamath v. Moadoc Tribes v. United States, 296 U.S. 244, 254 (1935).

The issue in this case is whether a Tribe could recover damages from the United States in a situation where, under well-settled principles of the law of fiduciaries, a ward-beneficiary would be entitled to compensatory damages. At common law, a trustee or guardian who frittered away his beneficiary's property-holdings would certainly be answerable in money-damages to the latter, and would not be permitted to take shelter behind the statute of limitations.

While the passage of the Indian Claims Commission Act in 1946 may have been thought by some to have finally resolved the issue of compensatory Indian claims, this statute did not extinguish any Indian's rights and, indeed, expressly recognized and preserved any equitable

claims that existed on the date of enactment. See Act of August 13, 1946, sec. 24, ch. 959, Public Law 726, 60 Stat. 1055. It was for these reasons that the Tunica-Biloxi Tribe decided to bring suit for damages arising out of the government's failure to have its land commission in Louisiana protect the Tribe's possession of its lands. Such the claim for relief was characterized by the Court of Appeals as one "for misfeasance or malfeasance of the government as trustee," Appendix, A-5, "the claimed trust relationship was efectively repudiated." Appendix, A-7. At that point, the Court reasoned, limitations began to run, and the six-year period contemplated by 25 U.S.C. 2501 had long since expired. Id.

However, the trust relationship between the United States and the Tunica-Biloxi Tribe has never been repudiated or terminated, either

directly or constructively. The Court of Appeals cites Jones v. United States, 801 F.2d 1334, 1335-1336 (Fed. Cir. 1986) cert. denied 481 U.S. 1013 (1987), but in that case the trust was unequivocally repudiated when the patented Indian allotment was seized and sold for back taxes by the Idaho county. Here, although there was an ouster of possession, the situation is not even remotely comparable to the issuance of an allotment patent, which is the end-result of a rather long process in which the allottee is given notice every step of the way. Moreover,(1)

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(1) In Jones, the Court of Appeals affirmed the dismissal in the Claims Court on grounds of trust repudiation and termination, whereas the Claims Court had found the existence of a debtor-creditor relationship to which an ordinary limitation period applied. See Jones v. United States, 9 Cl. Ct. 292, 295-296 (1985) aff'd on different grounds, 801 F.2d at 1335-1336.

while there was an unambiguous repudiation of the trust in Jones, there was certainly not one in this case. The law of equity is quite well settled that a trust repudiation must be unequivocal, and the beneficiary must have actually known of this repudiation. See, e.g., Chisholm v. House, 183 F.2d 698, 705-707 (10th Cir. 1950); Dewey v. Dewey, 163 Neb. 296, 79 N.W. 2d 578, 583 (1956); In re Estate of Barabash, 31 N.Y. 2d 76, 81, 334 N.Y.S. 2d

890, 894, 286 N.E. 2d 368, 371 (1971); see generally V.A. Scott & W. Fratcher, The Law of Trusts sec. 419, at p. 24 (4th edn. 1989). (2) Quite squarely presented by this case, is

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(2) The Court of Appeals cited Hopland Band of Pomo Indians v. United States, 885 F.2d 1573 (Fed. Cir. 1988) as authority that a misfeasance-nonfeasance claim is subject to limitations. Appendix, p 5A. However, limitations. Appendix, p. 5A. However, Hopland dealt with a statutory terination of an Indian tribe later re-recognized, and held that such a termination took a claim for denial of basic statutory benefits out from under the "court issuing claim" doctrine. It is arguable that the Tunica-Biloxi Tribe's claim here is such a "continuing" one. E.g., Duncan v. United States, 229 Ct.Cl. 120, 139, 667 F.2d 36, 48 (1981) cert. denied 463 U.S. 1228 (1983); Burich v. United States, 172 Ct. Cl. 139, 143, 366 F.2d 984, 986-987 (1966) cert. denied 389 U.S. 885 (1967); Friedman v. United States, 159 Ct.Cl. 1, 6-8, 310 F.2d 381, 381-384 (1962). A species of "continuing claim" was held enforceable by this Court, despite the passage of time, in United States v. Wardwell, 175 U.S. 48 (1898).

the rather mechanical imposition of the statute of limitations in 28 U.S.C. 2501 depriving the ward-Tribe of any redress against the guardian government. No satisfactory explanation of such a substantial diminution of the fiduciary obligation of the United States is found in the opinion of the Federal Circuit, and thus, an opportunity is presented to this Court for further augmentation of that obligation towards the Indian people of this country.

Respectfully sumitted,

Dated: August 1991

/s/ Donald Juneau

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APPENDICES

IN THE UNITED STATES CLAIMS COURT

TUNICA-BILOXI TRIBE,
a sovereign Indian Nation,
Plaintiff,

versus

UNITED STATES OF AMERICA,
Defendant.

June 13, 1990

No. 90-37 L

FINAL ORDER

For the reasons set forth at a hearing on June 13, 1990 (and which will be reflected in a transcript of the hearing), defendant's motion filed March 13, 1990 to dismiss this action for lack of jurisdiction, to the extent that it relies on 28 U.S.C. § 2501 (Argument II) and, alternatively, upon the limitation of actions inherent in the Indian Claims Commission Act of 1946 (Argument I), is hereby GRANTED.

Based on the foregoing, it is ORDERED that judgment be entered dismissing this action for lack of jurisdiction.

Each party shall bear its own costs. See Johns-Mansville Corp. v. United States, 893 F.2d 324, 328 (Fed. Cir. 1989)("the Claims Court has no power to award costs in cases over which it has no ... jurisdiction").

/s/ James T. Turner
Judge

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

90-5145

TUNICA-BILOXI TRIBE, a sovereign Indian Nation,

Plaintiff Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: May 17, 1991

Before RICH, ARCHER and LOURIE, Circuit Judges.

ARCHER, Circuit Judge.

DECISION

The Tunica-Biloxi Tribe (Tribe) appeals from the order of the United States Claims Court, No. 90-37 L, dismissing its complaint under Rule 58 of the Rules of the United States Claims Court because the Tribe's suit was barred

under the six-year statute of limitations prescribed by the Tucker Act, 28 U.S.C. 2501 (1988), and the limitation on actions inherent in the Indian Claims Commision Act of 1946. See 28 U.S.C. 1505 (1988), 25 U.S.C. 70k (1976). We affirm.

OPINION

The Tucker Act imposes a six-year statute of limitations for the filing of a petition on a claim against the United States. 28 U.S.C. 2501 ("Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such a claim first accrues."). In Hopland Band of Pomo Indians v. United States, 855 F.2d 1573 (Fed. Cir. 1988), the court said:

> [F]or the purposes of section 2501, it would appear more accurate to state that a cause of action against the government has "first accrued" only when all the

> events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence.

855 F.2d at 1577.

Although the Tribe's claim may well have accrued many years earlier, its counsel acknowledged before the Claims Court that the claim was sufficiently well-known to have been brought before the Indian Claims Commission between 1946 and 1951. The record shows that the Biloxi segment of the Tribe filed a claim with the Commission for some lands. Further, the Tribe had negotiation with the State of Louisiana and also submitted a Litigation Request to the Department of the Interior with respect to its claimed lands more than ten years prior to filing its complaint in the Claims Court. Under the circumstances, the Claims Court correctly held that the Tucker Act statute of limitations

had run.

The Tribe contends, however, that the statute of limitations does not bar its claim because it is based on breach by the government of a fiduciary obligation, and under the law of trusts, a cause of action for breach does not accrue until the trust is repudiated or terminated. Manchester Band of Pomo Indians, Inc. v. United States, 363 F.Supp. 1238, 1249 (N.D. Cal. 1973) (citing United States v. Taylor, 104 U.S. 216 (1881). If we assume a trust relationship existed, the rule relied on by the Tribe is applicable to a claim for recovery of corpus under an express trust, see, e.g. Hopland Bank, 855 F.2d at 1578, which is not involved here. At best, the assertions of the Tribe are for nonfeasance or malfeasance of the government as trustee. The Tribe contends that the government "failed as trustee to protect the Tribe's landholdings in Louisiana

from being illegally possessed by third persons," [Br. at 2] and "failed to instruct its land commissioners as to the modalities of aboriginal use and occupancy, the applicable Spanish law, and neglected to supervise and oversee the operations of the land commission" which "dispossessed the Tribe [sic] of almost all of its landholdings." [Br. at 2-3]

In a malfeasance or nonfeasance case, the alleged breach giving rise to the cause of action can be sufficient to repudiate the trust and start the statute of limitations running. Jones v. United States, 9 Cl.Ct. 292, 295 (1985), aff'd on other grounds, 801 F.2d 1334 (Fed. Cir. 1986); see also Hopland Bank, 855 F.2d at 1578. When the government allegedly breached its trust obligations, causing the Tribe to be divested of substantially all of its land over a forty-year period prior to 1840, the

claimed trust relationship was effectively repudiated. Jones, 801 F.2d at 1336. Accordingly, the Tribe's cause of action was not in any way tolled under trust concepts and the Claims Court's holding that the Tribe's complaint was time-barred under 28 U.S.C. 2501 was not erroneous.[1]

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[1] The Claims Court alternatively held that the Indian Claims Commission Act of 1946, 25 U.S.C. 70-a-70w (1976), was also a bar to suit in the Claims Court because the Tribe did not present its claim to the Commission for wrongs sustained prior to the passage of that Act. See 25 U.S.C. 70k. In view of our decision, we need not consider this issue.